Supreme Court, U.S.
FILED
APR 21 1997
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No. 96-1310

In the Supreme Court of the United States

OCTOBER TERM, 1996

PEDRO ALEJANDRO SALAZAR-HARO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether Section 440(a) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which precludes judicial review of final orders of deportation entered against aliens who have been convicted of certain serious crimes, divested the court of appeals of jurisdiction over a petition for review that was pending at the time of the AEDPA's enactment.

2. Whether Section 440(a)'s withdrawal of jurisdiction over pending cases violates the Ex Post Facto Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-22) is reported at 95 F.3d 309. The opinions of the Board of Immigration Appeals (Pet. App. 23-27) and the immigration judge (Pet. App. 28-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1996. The petition for a writ of certiorari was filed on December 11, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native and citizen of Peru, entered the United States as a legal permanent resident in September 1983. Pet. App. 16. In 1993 petitioner was convicted of conspiracy to distribute cocaine, in viola-

tion of 21 U.S.C. 846, and of aiding and abetting, in violation of 18 U.S.C. 2. Pet. 6. He was sentenced to 42 months in prison. Pet. App. 16.

In January 1994 the Immigration and Naturalization Service (INS or Service) commenced deportation proceedings against petitioner on the ground that his conviction for the aggravated felony of drug trafficking rendered him deportable under Section 241(a)(2)(A)(iii) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(2)(A)(iii). Pet. App. 29. Petitioner conceded the Service's factual allegations, but he denied deportability. *Ibid.* After reviewing the record of petitioner's convictions provided by the INS, the immigration judge (IJ) found petitioner to be deportable as charged. *Id.* at 29-30. Petitioner then requested a discretionary waiver of deportation under Section 212(c) of the INA, 8 U.S.C. 1182(c). Pet. App. 30.

The IJ denied petitioner's application for a waiver of deportation. Pet. App. 44. Applying standards previously adopted by the Board of Immigration Appeals (BIA or Board), the IJ held that petitioner, because of his conviction for a serious felony, would have to show "unusual or outstanding equities" in order to be eligible for a favorable exercise of discretion. *Id.* at 42. After carefully considering the evidence submitted by petitioner and the equities weighing in his favor (*id.* at 30-36, 41-43), the IJ concluded that petitioner's equities were outweighed by his history of illegal activity (*id.* at 43-44), and that "the well being of the community of the United States would not be best served by allowing respondent to remain in the United States" (*id.* at 44). The IJ therefore declined to grant petitioner's application for a discretionary waiver, and ordered him deported. *Ibid.*

The BIA affirmed. Pet. App. 23-27. The Board agreed with the IJ that petitioner would have to show unusual or outstanding equities in order to merit a waiver of deportation. *Id.* at 24. In the exercise of its discretion, the Board concluded that petitioner's relationship to his United States citizen children and his demonstration of remorse and rehabilitation were not sufficient to offset his history of criminal activity. *Ibid.*

2. Petitioner sought review of the BIA's final order of deportation in the United States Court of Appeals for the Third Circuit, under the provision for such review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a).

On April 24, 1996, while the petition for review was pending, the President signed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. Section 440(a) of the AEDPA, 110 Stat. 1276-1277, amended Section 106(a)(10) of the INA (previously codified at 8 U.S.C. 1105a(a)(10)) to provide, in pertinent part:

> Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D) * * * shall not be subject to review by any court.

Section 440(d) of the AEDPA further amended Section 212(c) of the INA, 8 U.S.C. 1182(c), to eliminate the Attorney General's authority to grant discretionary relief from deportation to any alien who "is deportable by reason of having committed any [such] criminal offense." 110 Stat. 1277.

The court of appeals dismissed the petition for review for lack of jurisdiction in light of the AEDPA.

Pet. App. 15-22. Because petitioner is deportable under Section 241(a)(2)(A)(iii) of the INA (previously codified at 8 U.S.C. 1251(a)(2)(A)(iii)), by reason of having committed an aggravated felony, the court concluded that Section 440(a) of the AEDPA precludes judicial review. Pet. App. 19. The court "carefully reviewed Title IV [of the AEDPA] to determine whether Congress provided expressly, or by implication, that the effective date of [Section 440(a)] would be other than the day of enactment." *Id.* at 20. Finding "no such indication," the court "agree[d] with similar conclusions by the Courts of Appeals for the Second, Fifth and Ninth Circuits" and held that the amendments limiting the courts of appeals' jurisdiction became effective upon enactment on April 24, 1996. *Ibid.*

The court found "unpersuasive" the decision in *Reyes-Hernandez* v. *INS*, 89 F.3d 490 (1996), in which the Seventh Circuit asserted continuing jurisdiction, under limited circumstances, over a petition for review filed before enactment of the AEDPA. Pet. App. 20. The court nonetheless noted that its ruling was "confined to the circumstances in this case where the petitioner seeks review of a final order of deportation," and did not necessarily "foreclose judicial review of all claims by aliens arising in the course of deportation proceedings," such as claims that an alien's right to due process in such proceedings had been infringed. *Id.* at 21.

ARGUMENT

1. Petitioner argues (Pet. 10-12) that the court of appeals erred in holding that Section 440(a) of the AEDPA divested it of jurisdiction over his petition for judicial review, which was pending at the time

the AEDPA was enacted. This Court has recently denied review in three cases raising the same issue, and there is no reason for a different result here. See *Mendez-Rosas* v. *INS*, 117 S. Ct. 694 (1997); *Chamorro-Torres* v. *INS*, No. 96-985 (Mar. 3, 1997); *Uwagbale* v. *INS*, No. 96-7454 (Mar. 31, 1997); see also *Qasguargis* v. *INS*, No. 96-806 (Feb. 24, 1997).

a. We note at the outset that petitioner's request for judicial review of the BIA's order is effectively moot, because the Attorney General no longer has the authority to grant the relief—a waiver of deportation under Section 212(c) of the INA—that petitioner seeks. Section 440(d) of the AEDPA amended Section 212(c) of the INA, 8 U.S.C. 1182(c), to exclude from the scope of its discretionary waiver provision "an[y] alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii)" of the INA (previously codified at 8 U.S.C. 1251(a)(2)(A)(iii)). 110 Stat. 1277. Petitioner's drug-trafficking offense is an "aggravated felony" that is "covered in" Section 241(a)(2)(A)(iii). See 8 U.S.C. 1101(a)(43)(B). Thus, petitioner is no longer statutorily eligible for the discretionary relief that he seeks through this proceeding.[1]

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[1] Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (*reproduced at* 142 Cong.Rec. H11,787-H11,833 (daily ed. Sept. 28, 1996)), repeals Section 212(c) in its entirety and replaces it with Section 240A of the INA (to be codified at 8 U.S.C. 1229b), which authorizes a new form of discretionary relief termed "cancellation of removal." See IIRIRA § 304(a)(3) and (b). With certain limited exceptions not applicable here, however, the IIRIRA's provisions respecting cancellation of removal apply only to administrative proceedings initiated on or after April 1, 1997. See IIRIRA

The AEDPA does not specify whether Section 440(d) bars the Attorney General from acting on a petition for relief under Section 212(c) filed on or before the date of the AEDPA's enactment. In her recent decision in a case referred to her by the BIA under 8 C.F.R. 3.1(h)(iii), however, the Attorney General formally determined that Section 440(d) applies to cases that were pending before the Executive Office for Immigration Review on the date of enactment. *In re Soriano* (Feb. 21, 1997).[2] Discretionary relief under the immigration laws is prospective in nature, and the new provision limits the Attorney General's power to confer such relief. *Id.* at 3-6.[3]

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§ 309(a) and (c). In any event, petitioner's drug-trafficking conviction would make him ineligible for relief under the new provisions. See INA § 240A(a)(3) (as amended by IIRIRA), to be codified at 8 U.S.C. 1229b(a)(3).

[2] We have provided petitioner with a copy of the Attorney General's opinion. Because the opinion is not yet published, we have also lodged a copy with the Clerk of this Court.

[3] See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984) ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future."); see also *Scheidemann* v. *INS*, 83 F.3d 1517, 1523 (3d Cir. 1996) ("Like statutes altering the standards for injunctive relief," changes in the scope of the Attorney General's discretionary authority "ha[ve] only a prospective impact."). Moreover, just as new "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994), the repeal of Section 212(c) speaks to the power of the Attorney General to waive deportation, not to any "right" of an alien to obtain such relief. The principles underlying the application of jurisdictional rules to cases pending in court, discussed below, thus apply equally to cases affecting the Attorney General's power to act. See *Scheidemann*, 83 F.3d at 1523 ("Like statutes constricting the jurisdiction of a judicial body," changes to the

Because the Attorney General lacks any authority under current law to grant petitioner's request for a waiver of deportation under Section 212(c), even a judicial reversal of her previous discretionary decision to deny relief could not avail petitioner now.

b. The court of appeals correctly concluded that Section 440(a) operated immediately to divest it of jurisdiction to review petitioner's pending case. In *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994), this Court explained that "application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. In particular, the Court noted that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. A new law "normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Ibid.*[4]

Landgraf reaffirmed the long-standing principle that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) (citing *Kline* v. *Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Gwin* v. *United States*, 184

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class of aliens eligible for Section 212(c) relief "speak only to the power of a public agency.").

[4] Accord *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in the judgments) ("Our jurisdiction cases are explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised.").

U.S. 669, 675 (1902); *Gurnee* v. *Patrick County*, 137 U.S. 141, 144 (1890); *Sherman* v. *Grinnell*, 123 U.S. 679, 680 (1887); *Railroad Co.* v. *Grant*, 98 U.S. 398, 401 (1879); and *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)). "When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved. * * * If the aim is to destroy a tribunal or to take away cases from it, there is no basis for finding saving exceptions unless they are made explicit." *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953). Accord, *Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870); *Insurance Co.* v. *Ritchie*, 72 U.S. (5 Wall.) 541, 544 (1867).

No provision of the AEDPA preserves the courts of appeals' jurisdiction over petitions for review that were pending at the time of its enactment.[5] Accordingly, Section 440(a) operated immediately to eliminate that jurisdiction. Although the dismissal of pending petitions may disappoint litigants who anticipated a further level of review, a new provision is not impermissible "merely because it * * * upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Like other new jurisdictional provisions, Section 440(a) speaks immediately and prospectively

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[5] Section 440(f) of the AEDPA provides that the amendments made by Section 440(e) (relating to modifications made to the definition of "aggravated felony") "apply to convictions entered on or after the date of [enactment]." 110 Stat. 1278. There is no provision regarding the effective date of other subsections of Section 440, however, and provisions relating to various other Sections provide no reliable indication of Congress's intent in that regard. See *Duldulao* v. *INS*, 90 F.3d 396, 398 n.2 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 675 & n.4 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997).

to deny courts the power to review final orders of deportation entered against alien aggravated felons. 511 U.S. at 274.

With the exception of the Seventh Circuit, which deviated from the others in a limited respect not applicable here, every court of appeals that has considered the matter has reached the same conclusion as the court below in this case, resulting in the dismissal of petitions pending before them. See *Figueroa-Rubio* v. *INS*, No. 96-3415 (6th Cir. Mar. 5, 1997); *Boston-Bollers* v. *INS*, 106 F.3d 352, 354-355 (11th Cir. 1997); *Kolster* v. *INS*, 101 F.3d 785, 787-791 (1st Cir. 1996); *Hincapie-Nieto* v. *INS*, 92 F.3d 27, 29 (2d Cir. 1996); *Duldulao* v. *INS*, 90 F.3d 396, 398-400 (9th Cir. 1996); *Mendez-Rosas* v. *INS*, 87 F.3d 672, 674-676 (5th Cir. 1996), cert. denied, 117 S. Ct. 694 (1997); see also *Sanchez-Rodriguez* v. *INS*, No. 96-9518 (10th Cir. July 12, 1996) (per curiam order dismissing petition for review for lack of jurisdiction).

In *Reyes-Hernandez* v. *INS*, 89 F.3d 490, 492-493 (1996), the Seventh Circuit held that Section 440(a) would not divest the court of jurisdiction to entertain a petition for review filed by an alien who had waived a colorable defense to deportability as part of a litigating strategy based on pre-AEDPA law, in order to focus on a request for discretionary relief under Section 212(c). The court concluded that, under those limited circumstances, "to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence." 89 F.3d at 492-493. That conclusion is at odds with this Court's teaching that jurisdictional statutes apply to cases pending at the time of their enactment because they address the power of

the courts, not the expectations of litigants. See *Landgraf*, 511 U.S. at 274-275. Moreover, we share the Second Circuit's skepticism "that any alien concedes deportability only because of the expected possibility of section 212(c) relief and the availability of a petition for review of the denial of such relief." *Hincapie-Nieto*, 92 F.3d at 30. As that court recognized, "[i]t is far more likely that deportability is conceded because there is no conceivable defense available." *Ibid.*

The Seventh Circuit has since limited *Reyes-Hernandez* to its facts. In *Arevalo-Lopez* v. *INS*, 104 F.3d 100 (7th Cir. 1997), the court made clear that it would not assert continuing jurisdiction if the petitioner either contested deportability, or had no colorable defense. See also *Yang* v. *INS*, Nos. 94-3071, 95-3665, 96-1824 & 96-2044 (7th Cir. Mar. 18, 1997), slip op. 9-11 ("*Reyes-Hernandez* is a decision with a limited domain, as *Arevalo-Lopez* properly recognizes—a domain that it would be inappropriate to expand, given the force of precedent in other circuits."). In this case, as in *Arevalo-Lopez*, petitioner contested deportability, but the IJ found him deportable on the basis of the record of his convictions introduced into evidence by the government. Pet. App. 29-30. There is no reason to believe that the Seventh Circuit would have asserted jurisdiction over petitioner's case.

c. The statutory issue petitioner seeks to raise affects only a limited and rapidly diminishing class of cases in which petitions for judicial review brought by alien felons were pending before the courts of appeals when the AEDPA was enacted in April, 1996. Moreover, as noted above, Congress has comprehensively revised the entire statutory framework relating to discretionary relief from deportation, with

general effect as of April 1, 1997. See note 1, *supra*. The question whether Section 440(a)'s amendment of Section 106(a)(10) of the INA—a provision that has now been repealed in its entirety—was or was not immediately effective is therefore of little continuing importance.

2. Petitioner also argues (Pet. 12-14) that Section 440(a)'s preclusion of judicial review in his case violates the Ex Post Facto Clause of the Constitution. Petitioner did not raise that claim in the court of appeals, and the court did not independently pass on the matter. The question is not properly presented to this Court in the first instance. See, *e.g.*, *Heller* v. *Doe*, 509 U.S. 312, 319 (1993); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991).

In any event, petitioner's claim has no merit. The Ex Post Facto Clause bars Congress from "retroactively alter[ing] the definition of crimes or increas[ing] the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990); accord *Lynce* v. *Mathis*, 117 S. Ct. 891, 896 (1997). In the immigration context, this Court has long held that the Clause does not prohibit Congress from making past conduct a new ground for deportation, because "[d]eportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952); see also *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). In *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955), for example, the Court upheld against an Ex Post Facto Clause challenge the deportation of an alien whose 1938 conviction became a ground for deportation under a provision first enacted in 1952. See also *Galvan* v. *Press*, 347 U.S. 522, 531 (1954) (Internal Security Act of 1950 applied to alien whose

deportable acts ceased in 1946); *Harisiades*, *supra* (Alien Registration Act of 1940 applied to aliens whose deportable acts had ceased before enactment); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913).

If the Ex Post Facto Clause is not violated by making past criminal conduct, which was not a ground for deportation when committed, a new ground for deportation, there can be no doubt that merely withdrawing the possibility of judicial review of a final order of deportation is permissible under that Clause. As the Court pointed out in *Landgraf*, a new jurisdictional rule, which "speak[s] to the power of the court rather than to the rights or obligations of the parties," generally "takes away no substantive right but simply changes the tribunal that is to hear the case." 511 U.S. at 274. Compare *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977) (Ex Post Facto Clause does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance"); *California Dep't of Corrections* v. *Morales*, 115 S. Ct. 1597, 1602, 1603 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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